U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 April 2004

CASE NO.: 2003-AIR-00035

IN THE MATTER OF

RON ROOKS,
Complainant

v.

PLANET AIRWAYS,
Respondent

APPEARANCES:

MARTIN E. LEACH, ESQ.
On behalf of the Complainant

ERIC ARRINGTON, ESQ.
On behalf of the Respondent

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER

This matter involves a dispute concerning alleged violations by the Respondent-employer, Planet Airways, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 et seq. (AIR21) and the regulations promulgated thereunder at 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or sub-contractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions or privileges of employment because the employee provided to the employer or the federal government information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration (FAA) or any other provision of federal law related to air carrier safety.

In early September 2002, Complainant Ron Rooks filed a complaint with the Department of Labor against Respondent alleging that he was terminated from work in violation of AIR21 in retaliation for his refusal to violate FAA regulations or to fly with fatigued crew members. On May 9, 2003, after conducting an investigation, the Assistant Secretary of Labor for Occupational Safety and Health dismissed the complaint for lack of merit. On June 3, 2003, Complainant timely filed a request for hearing under 49 U.S.C. 42121(b)(2)(A).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing commenced on October 21, 2003, and closed on October 22, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The following exhibits were received into evidence:[1]

1. Court Exhibit 1;
2. Complainant's Exhibit Numbers 1, 2 and 4-29; and
3. Respondent's Exhibit Numbers 1-5, 7-23, 25-26 and 28-31.[2]

Court Exhibit 1 is Respondent's motion in limine arguing that Complainant should not be allowed to present evidence on claims alleged after OSHA's determination that his case had no merit. I note that the initial complaint and documents filed with OSHA all revolve around the events that occurred on August 29, 2002. In his complaint, Complainant alleged he told the chief pilot that they were "starting to be concerned with the safety of the flight" and some of the "crew members were starting to show signs of fatigue, bad attitudes, negative remarks about being up all day and flying all night, yawning, and having a hard time staying awake waiting all day for the trip to start." (PA 13). I find the complaint put Respondent on notice that the issue to be decide is whether Respondent fired Complainant because he refused to fly because of crew fatigue and the fact that Complainant failed to cite a specific provision of the FAA regulations, laws or orders is irrelevant. Accordingly, the motion in limine is denied.

Post-hearing briefs were received from both parties on February 25, 2004. On March 1, 2004, Respondent filed a motion to strike the last forty-three pages of Complainant's post-trial brief, as the Court had instructed the parties at the hearing that briefs were to be restricted to twenty pages. While Complainant's brief is significantly longer than twenty pages in length, the length of the brief is at least partly due to Complainant's use of a larger typeface than the standard twelve point Times New Roman font. The Court notes as well that Respondent's brief, which numbers nineteen pages in

[1] References to the record are as follows: Transcript: Tr.; Court Exhibit: C-E; Complainant's Exhibits: R Ex.; Respondents' Exhibits: PA Ex.; Complainant's Brief: CB; Respondent's Brief: RB.

[2] PA Ex. 27, the deposition of Ladd Lewis, was admitted post-hearing. R. Ex. 29 is hereby admitted.

length, was written in a smaller typeface than the standard twelve point Times New Roman font. Given that the differences in font size account in large part for the disparity in the number of pages in the respective parties' briefs, the Court is not overly concerned with the fact that Complainant's brief was longer than twenty pages. Thus, Respondent's motion to strike is hereby denied.

At the time of the hearing, the parties agreed to the following stipulations:

1. Respondent, a commercial airline company who transports passengers and cargo with a place of business in Fort Lauderdale, Florida, is a person within the meaning of Sections 401.02 and 421.42.121E of AIR21.

2. Respondent hired Complainant as a pilot, such that Complainant is an employee as defined in Section 421.21A of AIR21.

3. On or about September 6, 2002, Complainant timely filed a complaint with OSHA alleging violations of AIR21.

ISSUES

1. Whether Complainant was engaged in protected activity as described in 49 U.S.C. § 42121;

2. If so, whether such activity was a contributing factor in Respondent's decision to discharge Complainant;

3. If so, whether Respondent has established by clear and convincing evidence that Respondent would have discharged Complainant absent his protected activity.

FINDINGS OF FACT

I make the following findings of fact based upon the testimony, supporting evidence and post-hearing briefs submitted by both parties:

1. Complainant has been a commercial and business pilot for over twelve years. He has never been cited for disciplinary action by the Federal Aviation Administration (FAA). In the 1990s, Complainant worked as a flight instructor for about three years before going to work for Amerijet International, a 121 cargo carrier. (Tr. 244). He started as a flight engineer in February 1994 and then became first officer. Complainant worked as first officer for about three years and then was promoted to captain. (Tr. 245). While working for Amerijet, Complainant flew cargo flights in the Caribbean, South America and Mexico.

During that time, Complainant flew in and out of Haiti about forty or fifty times and spent one or two nights there. (Tr. 245-46; R Ex. 1).

2. Complainant worked for Amerijet until 2001. (Tr. 246). He then began working for Midway Airlines for a short time before going to work for Respondent. (Tr. 246-47). After his initial training, Complainant was required to take a simulated check ride with the FAA. During the check ride, the FAA observed him in a simulator as he took off, landed and handled various emergencies to ensure that he was competent to control and fly the aircraft. (Tr. 256). Complainant failed this check ride. (Tr. 258-59). Complainant subsequently failed an airplane check ride when he descended too low on his final approach. (Tr. 259). Once Complainant corrected his problems and passed his check rides, he was hired by Respondent. (Tr. 260).

3. Matt Gorshe was employed as a first officer by Respondent from February 4, 2001, until he resigned in October 2003. (Tr. 36-37). He testified that Respondent employed approximately thirty-three pilots and ninety or 100 flight attendants. (Tr. 38). Mr. Gorshe estimated that he flew about ten flights with Complainant while working for Respondent. (Tr. 39). Mr. Gorshe had also flown with Complainant about a dozen times when both men worked for Amerijet. (Tr. 72). Mr. Gorshe, who was familiar with Complainant's abilities as a captain, testified that Complainant was a "very competent airman" with whom it was easy to get along. (Tr. 39).

4. On February 20, 2002, Complainant was operating a charter flight whose return was delayed for over two hours before a plane arrived. (Tr. 260-61). The passengers on that flight filed a complaint with Respondent, alleging that the flight attendants did not properly stow their bags. Respondent's director of flight training then asked Complainant for an explanation of what had happened. (Tr. 261-62). The flight attendants told Complainant that they did their jobs in accordance with regulations and procedures. (Tr. 262; PA Ex. 5).

5. On August 10, 2002, while Complainant was flying a trip around South America, the flight crew had an overnight stop in Chile. (Tr. 262-63). Complainant declined to stay in the hotel, although the rooms were clean and safe, because the neighborhood was bad, the rooms were small and there was no place to eat inside the hotel. (Tr. 263, 394-95). Complainant called Kelly Rafael, Respondent's crew scheduling representative, to report the situation. (Tr. 392-93, 395). Complainant requested that Respondent pay for another hotel, and Ms. Rafael told him that the small size of the hotel rooms was not a good reason to go to another hotel. (Tr. 263-64, 267). At the hearing, he affirmed that he said whatever he needed to say to get off the phone and get new hotel rooms. (Tr. 397). Complainant testified that he had never before changed hotels because the rooms were too small, and he

had never heard of another pilot at Respondent's company asking for a hotel room change on that basis. (Tr. 393; PA Exs. 7, 8).

6. Complainant testified that he never heard any more about this issue but that Jim Phinney, Respondent's chief pilot, complimented him on the South America trip when he returned. (Tr. 264, 268). However, Mr. Phinney testified that crew scheduling had complained to him after Complainant requested the change in hotels during the South America trip. Mr. Phinney noted that it was only after the crew scheduler told Complainant that the crew could only switch hotels if the hotel was dirty or unsafe that Complainant called back and reported that the hotel was dirty and unsafe. (Tr. 515). Mr. Phinney gave Complainant a verbal warning for this incident and explained that Complainant needed to communicate more clearly with the company when he wanted something to happen. (Tr. 516-17). Mr. Phinney felt that Complainant manipulated the truth in order to get his way. (Tr. 517).

7. On August 25, 2002, Complainant flew a plane from Fort Lauderdale to Denver, where the crew stayed overnight for two days. On the evening before the crew was scheduled to fly to Memphis and Orlando, one of the flight attendants became ill. At about 11:00 p.m., another flight attendant advised Complainant that the situation was under control, so he went to sleep. (Tr. 269).

8. Sabine Fulks began working for Respondent as a flight attendant in July 2000. (Tr. 112). She was promoted to senior flight attendant in September 2000. Ms. Fulks was in Denver on this flight sequence when the aforementioned flight attendant became ill and went to the hospital. (Tr. 113). Ms. Fulks stayed up for most of that night, calling the hospital and speaking to the intensive care nurses. (Tr. 114, 132).

9. Mark Stetler began working for Respondent as a flight attendant in August 2002 and was on the crew for the flight at issue in this case. (Tr. 163). At about 11:00 p.m., the ill flight attendant, who needed medical attention for some type of back injury, called Mr. Stetler, who took the other man to the emergency room and stayed with him at the hospital until about 3:30 a.m. (Tr. 166-67). At that time, Mr. Stetler informed Ms. Fulks of the situation and told her that the flight attendant would not be released to continue the flight. (Tr. 168).

10. Jose Yannes, who has been in the airline industry for fourteen years, was also part of the crew on the flight at issue in this case. (Tr. 210-11). Along with Mr. Stetler, Mr. Yannes accompanied the sick flight attendant to the hospital while the crew was in Denver. Mr. Yannes and Mr. Stetler arrived sometime around midnight and stayed at the hospital for approximately two hours. (Tr. 211-12).

After they arrived back at the hotel around 3:00 a.m., Mr. Yannes went to bed. (Tr. 213).

11. When the flight left Denver the next day, the sick flight attendant and another flight attendant stayed behind, so the crew had only the minimum number of flight attendants required to make the flight. (Tr. 336-37, 433). The crew flew to Memphis and then to Orlando, where they were scheduled to leave on another flight the morning of August 29. (Tr. 114, 168-69). On August 28, when the crew arrived in Orlando, Complainant noticed a mechanical problem with the plane, which he wrote up in the log book. (Tr. 269-70).

12. The crew members arrived in Orlando sometime in the evening and were advised that they would be departing on another flight the next morning at 8:30 a.m. (Tr. 169). The flight was to proceed from Orlando to Nassau, where the crew would pick up a group of repatriated Haitians, and on to Port-au-Prince to return the Haitians before flying back to Miami. (Tr. 45, 483-84). There was no meal service on the flight from Nassau to Port-au-Prince, so the flight attendants' primary duties were safety-related. (Tr. 484-85).

13. Ms. Fulks testified that she had difficulty falling asleep that night because she was wired from lack of sleep. (Tr. 134). Mr. Stetler, who had been traveling for five or six days, did not get much sleep that night. (Tr. 170). He testified that if he had not been up the night before, he probably would have had a good night's rest, but instead he felt tired when he woke up. (Tr. 194). Mr. Stetler told some of the crew members that he was tired but did not report fatigue to Complainant because he "felt [that he] could still give a hundred percent at that point." (Tr. 192). Mr. Yannes recalled that it was a long day, and he was tired from being up so late the previous night. (Tr. 213-14). Complainant affirmed that his wife, who was planning to go to Disneyland the next day, showed up unexpectedly at the hotel that night. (Tr. 471-72).

14. Complainant had told the crew that everyone should be down in the hotel lobby by 7:00 a.m. as the crew was scheduled to fly at 8:30 a.m. (Tr. 44) When Complainant called Respondent's dispatch and maintenance control office that morning, he was told that the check had not cleared, so the flight was delayed. (Tr. 270-71). When Complainant called back at 8:30 a.m., he was told that the flight departure time was now 11:00 a.m. (Tr. 271-72). Complainant called the crew members to tell them that the flight was going to be delayed until 11:00 a.m. due to a problem with the funds transfer. (Tr. 45-46).

15. At 9:30 a.m., Complainant sent the flight engineer, Chris Higgins, out to work on the plane. (Tr. 270). At 11:45 a.m., Complainant received a call from someone in dispatch, who told him that 2:00 p.m. was the new departure time. (Tr. 273-75).

Complainant told the dispatcher that he could not "be up all day and fly all night." (Tr. 274, 399). The crew checked out of the hotel at 12:30 p.m., went to lunch and then went to the airport, arriving at 1:00 p.m. (Tr. 47, 276). Complainant checked in again with Respondent and was told to stand by until the check cleared. (Tr. 276).

16. Mr. Gorshe, the first officer, did some standard pre-flight preparations, which took about twenty to thirty minutes. (Tr. 47). Mr. Gorshe determined that the paperwork for the flight was outdated, because under federal regulations, the paperwork is only good for six hours before becoming obsolete. He then told Complainant about the paperwork and also called Respondent to advise the dispatcher of the situation. (Tr. 48). The dispatcher agreed to fax new paperwork over to the crew. (Tr. 49).

17. Mr. Gorshe affirmed that it is not unusual for an on duty flight crew to have to wait for paperwork before taking off on a flight but noted that it is unusual for a flight to be delayed almost an entire day before actually departing. (Tr. 73, 106, 110-11). Mr. Stetler testified that in his five years as a flight attendant, he never had to wait such a long period of time on duty before the flight actually departed. On the other carriers that he flew for, the cutoff times for canceling the flight or sending the crew someplace else were four and five hours, respectively. (Tr. 195). He acknowledged that those airlines were scheduled airlines, whereas Respondent is a charter airline. (Tr. 207).

18. Ms. Fulks affirmed that delays in flight departure time are not very unusual in the airline industry. (Tr. 138). Mr. Yannes agreed that sometimes in the charter business, flight crews experience delays between scheduled and actual departure times. (Tr. 218). He testified that over a one year period, he has experienced ten to twelve hour flight delays on four or five different occasions while working for Respondent. (Tr. 237). On the other hand, Mr. Higgins testified that in his four years as a flight engineer, the delay on this day was "probably one of the more extreme cases" of delay that he has experienced. (Tr. 365).

19. At 2:00 p.m., the flight was delayed again, and the crew still had no paperwork. (Tr. 52-53). Complainant testified that he was "constantly on the phone" between 2:00 p.m. and 5:00 p.m. trying to find out the status of the flight and to obtain updated paperwork. (Tr. 278). At 4:30 p.m., Complainant called Ms. Rafael in Respondent's crew scheduling office and told her that he was waiting at the airport and had not received the paperwork. (Tr. 285-86). Ms. Rafael told Complainant that the dispatch employees had left for the day but that she would try to find out what was going on. Complainant then told her that if he did not get the paperwork soon, he would rent a van and drive the crew home. (Tr. 286; PA Ex. 14). At 5:30 p.m. Penny Delgado, another dispatcher, called Complainant. The crew still had

not received the paperwork and Complainant repeated his moment about renting a van. Sometime between 5:30 and 6:00 p.m., Ms. Delgado informed Complainant that the paperwork was being faxed to Delta and someone would hand carry it to the crew. (Tr. 288; PA Ex. 10). Complainant testified that he made the van comment in order to get things going. (Tr. 286, 288, 436-37).

20. At 5:00 p.m., Complainant noticed that the crew members were showing signs of fatigue. (Tr. 120, 279). Mr. Stetler affirmed that he and some of the other flight attendants had started to become fatigued. There was some concern about having to wait all day and fly all night. (Tr. 174). When Complainant called dispatch, the dispatcher told Complainant to leave right away, even though Respondent still had not faxed the new paperwork to the crew, because the funds had cleared the account. (Tr. 279, 478). The dispatcher had faxed the paperwork over to Delta Operations at the airport and told Complainant to go over there and get it, although it would take at least forty minutes to get over there and pick up the paperwork. Complainant told the dispatcher to fax it to him. (Tr. 56, 280, 283).

21. While Mr. Phinney was at dinner that night, he received a phone call and learned that the flight plan had not arrived to the crew and that the crew might not fly. (Tr. 487). At 6:20 p.m., Mr. Phinney called Complainant, who testified that he explained the paperwork situation as well as his concern that the crew members were beginning to show signs of fatigue. (Tr. 291). Mr. Phinney told Complainant that he would contact dispatch and try to get the paperwork to him. (Tr. 489).

22. Mr. Phinney recommended that the crew make it at least as far as Port-au-Prince, which was the revenue leg of the flight, or face the possibility of termination. (Tr. 291). Mr. Phinney suggested that the trip could terminate in Port-au-Prince that night. According to Mr. Phinney, Complainant refused to make the crew stay overnight in Port-au-Prince. (Tr. 492). Complainant testified that he told Mr. Phinney that he wanted to do the entire flight but that he was concerned with the safety of the flight because of the fatigue issue. (Tr. 291). However, Mr. Phinney testified that Complainant only said that fatigue *might* become an issue with the crew, whereas Mr. Phinney felt that crew fatigue was a worst case scenario which did not need to be dealt with at the time. (Tr. 490-91). Mr. Phinney told Complainant that he could not defend his refusal to get the trip started based on the potential for fatigue. He denied that Complainant told him that there were crew members who were already fatigued at that time. (Tr. 493).

23. According to Complainant, Mr. Phinney did not offer any options other than flying to Port-au-Prince. (Tr. 296). There was no discussion of whether Port-au-Prince was a dangerous place. (Tr. 292). Mr. Phinney told Complainant to discuss the situation with the crew and get back to him. (Tr. 492). In Mr. Phinney's opinion,

the overnight stay in Port-au-Prince "was refused over ignorance and lack of facts." (Tr. 536). During this conversation, Mr. Phinney got the impression that Complainant did not want the plane to depart. He felt that Complainant started bringing up other reasons for the trip not to operate. (Tr. 490).

24. After this conversation, Complainant gathered the crew together and explained that Mr. Phinney had said that it was in their best interest to make the trip. (Tr. 294). Complainant asked that the crew members let him know if they were too fatigued to do the trip. (Tr. 294). Three flight attendants—Ms. Fulks, Mr. Stetler and Mr. Yannes—all reported being too fatigued to make the trip to Port-au-Prince as per the regulations, so Complainant tried to come up with some other options. (Tr. 60, 175-76, 201, 203, 296). Ms. Fulks told Complainant that her fatigue was due in part to being up all night dealing with the sick flight attendant two days before. (Tr. 124). Complainant told Ms. Fulks that if one person was fatigued, the whole crew was grounded and would not be able to fly. Ms. Fulks testified that Complainant was "very positive" and tried to make sure that everyone understood the situation. (Tr. 123). Ms. Fulks understood Mr. Phinney's statement to Complainant to mean that the crew would be fired if they did not fly. (Tr. 121-22).

25. Mr. Gorshe expressed his concern of flying the entire trip given the amount of time the crew had been on duty with nothing to do but said that he was probably not too fatigued to fly to Port-au-Prince. (Tr. 59, 86-88). In addition, Mr. Gorshe expressed concern about staying overnight in Port-au-Prince and did not want to spend the night in a hotel there. (Tr. 62, 90-91). Mr. Higgins was taking cat naps on the plane while the crew waited to depart, but he told Complainant that although he was tired, he was willing and able to do the trip. (Tr. 86-88, 303).

26. Ms. Fulks and Mr. Stetler agreed that Complainant did "everything he could" to enable the flight to depart. (Tr. 153, 181). Mr. Yannes affirmed that Complainant was asking the crew members for their input rather than telling them what to think about the situation. (Tr. 235-36, 240). Nonetheless, at the end of the meeting, the group consensus was that the issue of flight attendant fatigue needed to be handled. The crew discussed the possibility of flying only to Nassau and then continuing to Port-au-Prince after an eight-hour rest period. (Tr. 63, 126).

27. When Complainant asked if Mr. Yannes would be able to fly to Nassau, Mr. Yannes stated that he would rather stay in Orlando, as he was too fatigued to fly to Nassau. (Tr. 222). He later clarified that he would have been able to do this ferry trip, but at the time, he did not know that he was not a required crew member for that flight. He explained that according to his current understanding of FAA regulations, he legally could have done the flight, although he was physically tired. (Tr. 225, 233-34). The flight attendants were not necessary crew members

during the ferry flight to Nassau because there were no passengers on the plane. (Tr. 63). On a flight without passengers, the flight attendants might be able to sleep, but often they have paperwork to fill out. In addition, they have to do security checks and follow many of the same procedures even though the plane has no passengers. (Tr. 158). In any case, Mr. Gorshe was under the impression that the flight attendants were too tired to fly at all. (Tr. 85).

28. After the crew members said that they were too tired to fly to Port-au-Prince, they had a brief discussion about their safety concerns about staying overnight in Port-au-Prince. (Tr. 146, 178). Complainant talked to the crew about Port-au-Prince to reassure them that the hotel where they were staying was safe. (Tr. 124-25, 295-96, 301). Ms. Fulks affirmed that Complainant mentioned the hotel to encourage the crew to accept the flight. (Tr. 125). Ms. Fulks told Mr. Yannes that she did not want to go to Haiti because of safety concerns, but Mr. Yannes did not remember anyone else saying that they did not want to go to Haiti. (Tr. 224). Respondent terminated Ms. Fulks' employment on January 17, 2003, on grounds that she was drinking on a flight. (Tr. 131). Ms. Fulks affirmed that she believes that her termination was unjust. (Tr. 151).

29. Complainant called Mr. Phinney back. He reported that the crew members had agreed that they were not going to do the trip. (Tr. 301-02, 304, 494). Complainant never reported that he was too fatigued to fly the entire trip himself. (Tr. 523).

30. Complainant offered to fly the plane to Nassau and spend the night so that the crew could get some rest. (Tr. 301-02). He testified that he, Mr. Gorshe and Mr. Higgins would have been able to continue on to Port-au-Prince with another flight crew but that Mr. Phinney never offered to substitute new flight attendants for that leg of the trip. (Tr. 443-46). Mr. Phinney affirmed that the Nassau to Haiti leg was the revenue portion of the trip, so if the plane could have been flown to Nassau and the crew exchanged for a new crew, Respondent would have been able to collect all of the revenue for the trip. (Tr. 494-95).

31. At the hearing, Mr. Phinney agreed that the flight crew could have been replaced in Orlando but did not believe that this possibility was discussed. He felt it would have been preferable for the crew change to occur in Nassau rather than Orlando but did not recall whether replacement of the crew was ever discussed. (Tr. 533). According to Complainant, Mr. Phinney never suggested that the crew fly to Nassau. (Tr. 324-25). Complainant did not believe that there was any sort of miscommunication between himself and Mr. Phinney on this issue. (Tr. 469).

32. Complainant suggested that the crew could spend the night in Orlando and do the entire trip the next morning. (Tr. 302, 304). Complainant and Mr. Phinney

discussed Port-au-Prince being a dangerous city. (Tr. 304). Mr. Phinney felt that "there was some external factor at work . . . because the situation didn't make any sense." (Tr. 495-96). He could not understand why the crew was claiming fatigue when they had arrived in Orlando in the early evening of the previous day and did not arrive at the airport until 1:00 p.m. on August 29, but he did not know that the flight attendants had been up with a sick crew member two nights before. (Tr. 496, 501, 574). Mr. Phinney told Complainant that he would arrange a hotel for the crew to stay in and then called Joe Gleason, Respondent's director of operations, and told him that the crew had refused the trip. (Tr. 502). Mr. Phinney never insisted that Complainant fly fatigued. (Tr. 451-52).

33. About five minutes later, Peter Garambone, Respondent's CEO, called Complainant and told him not to fly fatigued. Mr. Garambone requested that Complainant fly the plane back to Fort Lauderdale so that the crew could be replaced. (Tr. 302). Complainant testified that the paperwork for the original trip still had not arrived when the plane took off, but Respondent did fax over the paperwork for the ferry flight home. (Tr. 338, 440-41). The flight took off from Orlando to Fort Lauderdale at a little after 8:00 p.m. (Tr. 338, 65-66).

34. During the flight, the destination was changed from Fort Lauderdale to Miami. (Tr. 66). Mr. Yannes testified that neither he nor any of the other crew members appeared too fatigued to perform their duties on the ferry trip back to Miami that night. (Tr. 231). No other crew made the flight to Port-au-Prince that night, and Respondent lost the contract as a result of Complainant's unwillingness to make the flight. (Tr. 326). After the crew deplaned, Respondent told Complainant to have all seven crew members report to the office on the following day for a meeting, and Complainant relayed this message to the crew members. (Tr. 180, 236-37).

35. On the following day, Ms. Fulks and the other flight attendants got called in for a meeting with Liz Sanders, the chief flight attendant. Ms. Sanders asked everyone to give a statement. (Tr. 219). Ms. Sanders asked Ms. Fulks some questions and then drafted a statement for her to sign. (Tr. 115). In the statement, Ms. Fulks claimed fatigue. She did not know whether Mr. Phinney ever received a copy of her statement. (Tr. 127). Ms. Fulks testified that she felt intimidated at this meeting because Ms. Sanders told her that Mr. Garambone wanted to fire the entire crew, but she did not know whether anyone on the crew was actually fired. (Tr. 147-48). Ms. Fulks was demoted as a result of the events of August 29. (Tr. 151-52).

36. Mr. Yannes also filled out a report at the behest of Ms. Sanders, who asked him to relate the events of the previous day in specific detail. (Tr. 218-19). According to Mr. Yannes' statement, the crew waited for the paperwork all afternoon and

reported fatigue at 7:00 p.m. when Complainant told then that they would become illegal due to the amount of hours of operation. (Tr. 220). He later clarified this statement in his testimony, explaining that the crew members reported fatigue before Complainant told them that they would become illegal. (Tr. 220-21). When Mr. Yannes reported fatigue, he meant that he was too tired to fly for purposes of FAA regulations. (Tr. 222).

37. At Ms. Sanders' request, Mr. Stetler drafted a statement and faxed it to Respondent's office, since he was too ill to attend the flight attendants' meeting. (Tr. 164-65). Mr. Stetler explained that he did not mention anything about crew fatigue in his statement because he was only asked to list events as they happened, rather than including any personal feelings. (Tr. 189).

38. While Ms. Sanders and an assistant interviewed the flight attendants, Mr. Phinney, Mr. Gleason and the training coordinator interviewed the pilots. (Tr. 503). To Mr. Phinney's understanding, two of the flight attendants did not really understand what was going on and "just sort of went along" with what was happening because everyone else was. (Tr. 504). According to Mr. Phinney's notes at the time, Ms. Sanders had indicated that the crew members were simply following instructions and were not fatigued. (Tr. 560). Mr. Phinney pointed out that Ms. Fulks had said she would never consider staying in Port-au-Prince. (Tr. 504). He noted that Ms. Fulks was demoted for a short time after being told that she was obligated to accept assignments from the company as long as it was legal and moral to do so. (Tr. 504-05).

39. When the crew members were interviewed that day, Mr. Gleason was late and missed the first interview. (Tr. 534). Mr. Higgins was called in for a meeting at Respondent's office in the early afternoon. (Tr. 383). After interviewing Mr. Higgins, Mr. Phinney concluded that he was "out of the loop on the decision making process." Mr. Higgins had told Complainant that although he would rather do the trip to Haiti the next day, he was able to do it as scheduled on the night of August 29. (Tr. 505). Mr. Higgins had no problem staying in Port-au-Prince. (Tr. 506).

40. Mr. Gorshe also met with Mr. Phinney and Mr. Gleason that day. (Tr. 66-67). During the meeting, Mr. Gorshe was asked about the events of the previous day, including his fatigue status and the fatigue status of the flight attendants. He told Mr. Phinney and Mr. Gleason that some of the flight attendants had been fatigued. (Tr. 67). According to Mr. Phinney, Mr. Gorshe was non-communicative during his interview and said that he would never spend the night in Port-au-Prince. (Tr. 506). Mr. Phinney testified that Mr. Gorshe said that he was too fatigued to do the entire trip but not too fatigued to fly to Miami. (Tr. 553-59). At Mr. Phinney's recommendation, Respondent suspended Mr. Gorshe for refusing an overnight

stay in Port-au-Prince. (Tr. 91, 565). He was suspended without pay for two days, at which time he was suspended without pay for two weeks. (Tr. 68). Mr. Gorshe disputed Respondent's reason for suspending him, as he never refused to do the trip to Port-au-Prince. (Tr. 98-99).

41. Complainant waited for approximately one and a half or two hours while Mr. Phinney and Mr. Gleason interviewed Mr. Higgins and then Mr. Gorshe. (Tr. 328). He explained that Mr. Gleason was twenty or thirty minutes late for the meeting because he was coming back from lunch. (Tr. 483). However, Mr. Phinney explained that Complainant's total wait time was not due to Mr. Gleason's tardiness; rather, Complainant was kept waiting because they wanted to interview Complainant after speaking to all the other crew members. (Tr. 535).

42. When Complainant met with Mr. Phinney and Mr. Gleason, he explained his version of what had happened on the previous day, including the crew fatigue circumstances. (Tr. 329, 506-08). Complainant affirmed that he was scared and said whatever he could to save his job. (Tr. 458-59). Mr. Phinney learned that Complainant had threatened to rent a van and drive the crew home unless he received the paperwork. Mr. Phinney felt that this statement was "counterproductive to people working together, running an airline." The schedulers were concerned that Complainant really would rent the van and drive off. (Tr. 508). After the meeting, Complainant was suspended for two weeks with pay. (Tr. 330).

43. A few days later, Mr. Phinney called Complainant in for another meeting with himself and Mr. Gleason. (Tr. 330). Mr. Phinney testified that the second meeting with Complainant got off to a bad start when he called Complainant to schedule a meeting time and Complainant told Mr. Phinney to make sure that Mr. Gleason did not keep him waiting this time. (Tr. 535). At that meeting, Mr. Gleason asked Complainant what type of punishment he thought he deserved for his actions. Complainant replied that he did not think he had done anything wrong and thus did not believe that he deserved any punishment. (Tr. 330). Complainant stated that he believed he had made the right decision not to fly under the circumstances and that he would do the same thing again. (Tr. 470-71). At that point, Mr. Phinney requested immediate termination because he felt that Complainant was not taking responsibility for his actions. Mr. Gleason told Complainant that he had to back up Mr. Phinney's decision, since he was the chief pilot. (Tr. 330). Complainant was thereafter escorted out of the building by the senior flight engineer, and on the following day, he contacted OSHA to lodge a complaint. (Tr. 331, 459).

44. At the hearing, Mr. Phinney speculated that on the day in question, Complainant was suffering from some sort of additional stress which was not job-related but

which nonetheless broke down his rational decision-making process. (Tr. 519). Mr. Phinney affirmed his awareness that a crew member on one of Complainant's trips had complained that Complainant's wife and son had shown up in Miami on one of Complainant's overnight trips and that some sort of altercation had occurred with a flight attendant. (Tr. 520-21). Mr. Phinney never spoke to Complainant about the incident because Human Resources advised him not to do so. (Tr. 521). He did not know that Complainant's wife showed up in Orlando the night of August 28, 2002. (Tr. 521-22).

45. Mr. Phinney testified that Complainant ultimately was terminated for poor performance because he did not meet the performance standards of a captain. (Tr. 510). He denied that Complainant was fired because his refusal to fly a flight with fatigued crew members resulted in a loss of revenue for Respondent. (Tr. 575). According to Mr. Phinney, some of the crew members on the flight at issue were unable to account for the reasons for fatigue. (Tr. 531). Mr. Phinney did not expect the pilot in charge of a flight to unilaterally assess the fatigue level of crew members. (Tr. 575, 577). Mr. Phinney testified that Complainant told the flight attendants that they would be illegal for the trip so that they would refuse to fly. (Tr. 510-11). However, according to Mr. Stetler, the reason that the crew did not fly was because the flight attendants were fatigued. (Tr. 180-81). Mr. Higgins affirmed that the flight at issue was postponed by Complainant because of crew fatigue. (Tr. 386).

46. Mr. Phinney testified that the company did not want to fire Complainant, but he decided to terminate Complainant after Complainant said that he would have made the same decisions again. (Tr. 512-13). In addition, Complainant had other performance issues, as he had failed two check rides, which is "a huge deal," according to Mr. Phinney. (Tr. 513-14). Mr. Phinney acknowledged that he too has failed two check rides. (Tr. 562).

47. Butch Elkins is Respondent's manager of human resources. Mr. Elkins was not working for Respondent when the incident in question occurred in August 2002. (Tr. 587). He testified that progressive discipline means that there are different levels of discipline depending on the infraction or violation, ranging from verbal warnings to written warnings to termination. (Tr. 592). In Complainant's case, progressive discipline was not used, as he was immediately terminated. According to Mr. Elkins, this termination was not a violation of Respondent's supervisor's handbook. (Tr. 593).

48. When Complainant contacted OSHA after his termination, he spoke with Clarence Kugler, who asked him to write a detailed complaint providing the full circumstances of his termination. (Tr. 459-60). When Mr. Kugler asked Complainant about the nature of his complaint, Complainant talked about safety

issues and regulations. (Tr. 331). Complainant testified that the main concern that he addressed in his letter to Mr. Kugler was crew fatigue as well as his concern that Respondent discriminated against him. (Tr. 412). Although Complainant mentioned in his complaint that the crew was concerned with safety issues associated with overnighting in Port-au-Prince, he testified that this concern, which would not have justified canceling the flight, was secondary to the fatigue issue. (Tr. 310-11, 415-17).

49. Complainant testified there is an FAA regulation which states that whenever a captain is aware of a hazardous condition, he shall restrict and suspend operations until such condition is corrected. (Tr. 420-22). According to Complainant, flying with fatigued crew members is such a hazard. (Tr. 423-24). He agreed that he would defer to an FAA investigator's opinion on the subject. (Tr. 424). Complainant testified that there is another FAA regulation that prohibits a pilot from flying in a careless or reckless manner. Complainant agreed that he violated no FAA regulations because he elected not to fly. (Tr. 349). He pointed out that if he had flown as Respondent had ordered him to do, he would have violated FAA regulations. (Tr. 350).

50. As a captain, under Respondent's General Operations Manual (GOM), Complainant was required to comply with Respondent's policies and to report to the chief pilot. (Tr. 314). Complainant was responsible for delegating duties and for the safety of the crew, passengers, cargo and the aircraft itself. (Tr. 317). Complainant had a responsibility to ensure that all crew members were performing their duties. (Tr. 345). He was required to abide by all federal aviation regulations, company operation specifications and all rules applicable to a particular flight. (Tr. 315).

51. In determining whether to follow the GOM or the FAA regulations, Complainant was required to follow whichever procedure was the most restrictive, although violation of a GOM regulation does not have the same effect as a violation of the FAA regulations. (Tr. 350, 543). Complainant was also required to have the most current information available pertaining to the conduct of a given flight. (Tr. 315). If Complainant ever deviated from the established regulations, he was required to contact the chief pilot as soon as possible to report the circumstances. (Tr. 315-16). Complainant affirmed that he followed this regulation when he told Mr. Phinney that he had not received the requisite paperwork on the day in question. (Tr. 316).

52. Mr. Phinney and Complainant disagreed on the time guidelines for the flight in question. While Complainant did not believe that the flight could be completed within sixteen hours of duty time, Mr. Phinney believed that it could have. (Tr. 339-41, 528). In Complainant's opinion, Mr. Phinney's estimated duty time of

fifteen hours and forty-five minutes for the Port-au-Prince trip was not a reasonable schedule. (Tr. 339). Complainant estimated that it would take about sixteen and a half hours to complete this trip, which would be two and a half hours over the FAA regulations' duty time for flight attendants. However, in Complainant's view, it was a fatigue issue more than a duty time issue. (Tr. 341).

53. In August or September 2002, Complainant spoke with Ladd Lewis, an aviation safety inspector for the FAA in Fort Lauderdale, regarding his termination by Respondent. (Tr. 347-48; PA Ex. 27, pp. 17, 20). Mr. Lewis is assigned as a principal operations inspector (POI) for four 121-air carriers, including Respondent. (PA Ex. 27, p. 17). His duties include overseeing the safety oversight responsibilities of the FAA for operations programs, flight attendant programs and crew training. (PA Ex. 27, pp. 19-20). He has worked as Respondent's POI for a little over a year. (PA Ex. 27, p. 20).

54. At their meeting, Mr. Lewis and Complainant discussed Complainant's termination, particularly the issue of whether any duty time or fatigue regulations had been violated. (PA Ex. 27, pp. 20-21). They went over the itinerary of the proposed flight, and Complainant gave Mr. Lewis a chronology of events from the day in question. (PA Ex. 27, p. 21). Mr. Lewis told Complainant that he did not believe that the flight had violated FAA flight and duty time regulations and noted that fatigue was not covered in the rules. (PA Ex. 27, pp. 22, 29, 41). Mr. Lewis did not recall whether Complainant asked him if it was alright under the regulations to fly with fatigued crew members. (PA Ex. 27, pp. 41, 43).

55. At the end of the meeting, Complainant and Mr. Lewis agreed that the flight as intended would not have exceeded the applicable rules. (PA Ex. 27, p. 32). Complainant testified that Mr. Lewis' assistant commented that he would have been in more trouble if he had forced the crew to fly fatigued. (Tr. 353, 465-66). In a letter, Mr. Lewis told Complainant that he could not confirm that hypothetical conclusion. (Tr. 466). Mr. Lewis affirmed his awareness that other pilots have made allegations that Respondent has violated flight and duty time regulations. (PA Ex. 27, pp. 46-47).

56. Complainant started ground school with Spirit Airlines about two and a half weeks before the hearing in this case. (Tr. 356). When he worked for Respondent, he was paid $75 per hour, with a sixty-hour guarantee. (Tr. 356-57). Complainant earned about $4,500 per month and also received between $200 and $300 in per diem benefits each month that he flew. Complainant does not have health insurance because he cannot afford it. (Tr. 357). When he was working for Respondent, Complainant paid $203.12 per month in health insurance benefits for his family. (Tr. 358-59). After his termination, Complainant worked for about three months as an electrician and earned about $3,200 per month. He did not

receive any health insurance benefits from that job. Complainant currently earns about $1,500 per month from Spirit Airlines. (Tr. 359). He expects to earn $38 per hour based on a seventy-hour guarantee, or about $2,600 per month, once he finishes ground school. (Tr. 360).

57. Complainant does not seek reinstatement by Respondent. He is seeking back pay with interest as well as reimbursement of his health insurance benefits and compensatory damages. (Tr. 361). He testified that he had to borrow about $8,000 after he was terminated by Respondent. (Tr. 361). Although Complainant's wife has continued to work since his termination, he testified that "it's hard to get by." (Tr. 362). Complainant received about nine months of unemployment compensation (forty-four weeks) at about $275 per week. (Tr. 480-81).

58. I found Fulks, Yannes, Stetler, Gorshe and Complainant to be credible witnesses concerning the events that took place on August 29, 2002. I find that Fulks, Stetler and Yannes were in fact fatigued.

LAW AND CONTENTIONS

AIR21 states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 3) testified or is about to testify in such a proceeding; or 4) assisted or participated or is about to assist or participate in such a proceeding. 29 C.F.R. § 1979.102.

To establish a discrimination complaint and entitlement to relief, Complainant must prove by a preponderance of the evidence that a protected activity was a contributing factor in an unfavorable personnel action. Complainant must show:

1) He engaged in a protected activity or conduct;
2) Respondent knew, actually or constructively, that Complainant engaged in the protected activity;
3) Complainant suffered an unfavorable personnel action; and

4) The protected activity was a contributing factor in the unfavorable action.

Protected Activity

Case law and secretarial decisions regarding similar whistleblowing statutes provide additional insight into what constitutes protected activity. An employee's acts must implicate safety definitively and specifically to be considered protected. American Nuclear Resources v. United States Dep't of Labor, 134 F.3d 1292 (6th Cir. 1998). Although the employee's allegation need not be ultimately substantiated, the employee must have a reasonable belief that his or her safety complaint is valid. Minard v. Nerco Delamar Co., 1992-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8; Kesterson v. Y-12 Nuclear Weapons Plant, 1995-CAA-12 (ARB Apr. 8, 1997); Nathaniel v. Westinghouse Hanford Co., 1991-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9. The Secretary has held consistently that internal complaints are protected activity under the whistleblower provisions of the environmental statutes. See, e.g., Bassett v. Niagara Mohawk Power Corp., 1985-ERA-34 (Sec'y Sept. 28, 1993); Helmstetter v. Pacific Gas & Elec. Co., 1991-TSC-1 (Sec'y Jan. 13, 1993); Williams v. TIW Fabrication & Machining, Inc., 1988-SWD-3 (Sec'y June 24, 1992).

Complainant alleges that he engaged in protected activity when he refused to complete the Port-au-Prince trip as scheduled because of crew fatigue. The flight, which had been scheduled to leave at 8:30 a.m., was delayed several times throughout the course of the day as the crew waited for a check to clear and for the necessary paperwork to arrive. Sometime in the early evening, Complainant noticed that some crew members were showing signs of fatigue. Complainant called Mr. Phinney, Respondent's chief pilot, and explained his concerns about crew fatigue and reported that the crew still had not received the requisite paperwork. Ultimately, before the flight was to depart that evening, three flight attendants claimed fatigue, and because these flight attendants were required crew members for at least certain portions of the flight sequence, the trip could not be completed without them. Complainant then reported to Mr. Phinney that the flight could not be completed according to the schedule.

I found Complainant to be a credible witness, and accordingly, I give great weight to his testimony regarding his concerns about crew fatigue. In addition, I found that the flight attendants who reported fatigue were also credible witnesses, and their testimony clearly supports Complainant's own testimony regarding the events of the day in question. Complainant's crew members have corroborated his allegations that the flight was refused that day due to crew fatigue. At the time when Complainant voiced his concerns about crew fatigue, he believed that to fly with fatigued crew members would constitute a violation of the FAA regulations. As the case law notes, it is ultimately irrelevant whether or not crew fatigue is in fact covered under the FAA regulations so long as Complainant reasonably believed that flying with fatigued crew members would

violate the regulations. Because Complainant verbally voiced his safety concerns to his superior when he refused to fly the scheduled flight on August 29, 2002, I find that Complainant has established that he engaged in a protected activity for purposes of AIR21.

Adverse Employment Action

It is undisputed that Complainant suffered an adverse employment action when he was discharged from Respondent's employ in August 2002.

Respondent's Knowledge of Protected Activity

I note Mr. Phinney's testimony corroborates Complainant's testimony that crew fatigue was discussed a reason the scheduled flight was being refused. Mr. Phinney simply refused to believe what Complainant was telling him. Mr. Phinney was not aware of the problems with the flight attendant in Denver, shifted responsibility for the paperwork problem to Complainant and speculated that Complainant had other reasons for not wanting to complete the scheduled flight.

As the Court has noted, Complainant was a credible witness. He testified that he explained to Mr. Phinney that the crew members were showing signs of fatigue. Mr. Phinney, on the other hand, initially thought that Complainant was refusing the flight based on the *potential* for crew fatigue. In any case, despite any misunderstandings during this conversation, Complainant then spoke to the crew and reported back to Mr. Phinney that some crew members were claiming fatigue. Whether or not Mr. Phinney agreed with or understood Complainant's assessment of crew fatigue, the testimonial evidence indicates that he indeed understood at the very least that Complainant was claiming crew fatigue as his reason for refusing the flight to Port-au-Prince. Thus, Complainant has established Respondent's knowledge of his protected activity under AIR21.

Protected Activity as Contributing Factor in Adverse Employment Action

There is no question that Complainant's termination constituted an adverse employment action under AIR21. At a meeting several days after the flight was refused, Complainant stated that he believed that his decision to refuse the flight was the right one under the circumstances. Mr. Phinney then requested immediate termination because he felt that Complainant was not taking responsibility for his actions. He later explained that Complainant ultimately was terminated for poor performance because he did not meet the performance standards of a captain, denying that Complainant was fired because his refusal to fly with fatigued crew members resulted in a loss of revenue for Respondent. The timing of Complainant's termination, which arose shortly after the

flight was refused, certainly gives rise to an inference that his engagement in protected activity was a contributing factor in his discharge.

Respondent in this case argues that Complainant had no intention of flying the Port-au-Prince trip as scheduled on August 29, 2002. Respondent alleges that Complainant's concerns about crew fatigue were used as a mere pretext and that Complainant manipulated the crew members into claiming fatigue. According to Respondent's theory, the crew members who claimed fatigue only did so at Complainant's behest. Mr. Phinney, Respondent's chief witness, could not understand how the crew could be fatigued when they had arrived in Orlando and had a full night's sleep the previous evening. He theorized that Complainant told the flight attendants that they would be violating duty time regulations if they took the flight in order to get them to claim fatigue so that there would be a legitimate pretext to refuse the flight. He also speculated that Complainant was suffering from some sort of additional stress which was not job-related but which nonetheless broke down his rational decision-making process, culminating in his refusal to fly. Respondent has intimated that Complainant was engaged in an affair with another flight attendant and that his wife's arrival at his hotel room the night before the Port-au-Prince flight was the source of his distress. Respondent argues that Complainant engaged in "social engineering" in order to ensure that the flight would not depart.

While Respondent has constructed an alternate theory to explain Complainant's refusal to fly, it has offered little to no evidence to support the theory. Rather, the evidence as a whole tends to supports Complainant's version of events on the day in question. As previously noted, the testimony of the crew members on the flight at issue provides corroboration for Complainant's version of events. The three fatigued crew members had been up in the middle of the night dealing with a medical crisis two nights before. At least two of the flight attendants did not sleep well on the night of August 28, 2002. When they arose for an 8:30 a.m. scheduled flight on the morning of August 29, they were informed that the flight had been delayed. They proceeded to spend nearly the entire day waiting at the airport for the plane to leave. Not only was there a delay due to monetary issues, but Respondent failed to provide the crew with the proper paperwork to enable them to depart. Whether or not such a delay was unusual is largely irrelevant in view of the fact that the circumstances on this particular day lent themselves to a situation of crew fatigue.

The crew members agreed that Complainant tried to do all he could to get the plane to depart or to fly at least part of the journey that night. Complainant's testimony that he suggested that the crew fly at least to Nassau and either replace the flight attendants or overnight there was corroborated by the testimony of the other crew members, who confirmed that Complainant raised this option as a possibility. Even though Mr. Phinney agreed at the hearing that this option would have been preferable to a crew change in Orlando, he never offered this suggestion at the time, essentially telling

Complainant to complete the flight as scheduled "or else." Mr. Yannes testified that the crew members reported fatigue before Complainant told them that they would become illegal if they flew the scheduled flight sequence. The crew members testified that Complainant only raised the issue of safety in Port-au-Prince after they had reported that they were too fatigued to fly. The evidence shows that Complainant asked the crew members how they were feeling and requested their input on the situation, rather than suggesting to them that they claim fatigue so that the flight could be refused.

Respondent acknowledged that his wife came to his hotel room the night before the Port-au-Prince flight and explained that she was in Orlando to take her cousin to Disneyland. While Mr. Phinney testified that a crew member on another trip with Complainant had complained that Complainant's wife and son had shown up on an overnight trip and that some sort of altercation had taken place with a flight attendant, the crew members on the flight at issue testified that they had no personal knowledge of an affair between Complainant and a flight attendant, other than some awareness of rumors to that effect. In determining whether Complainant's termination was a result of discriminatory actions by Respondent, the Court simply refuses to rely upon innuendos which are not substantiated by the evidence, particularly in view of the fact that the preponderance of the evidence in this case supports Complainant's claim that the flight was refused due to crew fatigue and not because of some personal situation unrelated to the job. I find that Complainant has succeeded in establishing by a preponderance of the evidence that his termination was the result of his engagement in protected activity.

In the event that a complainant proves the case in chief by a preponderance of the evidence, a respondent may still avoid liability for the discrimination through a statutory and regulatory affirmative defense. According to 49 U.S.C. §§ 42121 (b)(2)(B)(ii) and (iv) and 29 C.F.R. § 1979.109(a), a complainant may not obtain relief under AIR21 if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of "clear and convincing," that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. See Yule v. Burns Int'l Security Serv., 93-ERA-12 (Sec'y May 24, 1995).

Respondent argues that even if Complainant had engaged in protected activity when he refused to fly on August 29, 2002, he still would have been terminated for non-discriminatory business reasons. Respondent alleges that Complainant was both an incompetent airman and an insubordinate employee. To support its argument, Respondent first cites the fact that Complainant failed two check rides before he was hired by Respondent. In addition, Respondent notes that on February 20, 2002, Complainant was operating a charter flight that was delayed for over two hours until a plane arrived. The passengers on that flight filed a complaint with Respondent, alleging

that the flight attendants did not properly stow their bags, and Respondent's director of flight training asked Complainant for an explanation.

On another flight sequence in August 2002, a few weeks before the flight at issue in this case, Complainant was on an overnight stop in Chile when he declined to stay in the assigned hotel and requested a change in hotels from Ms. Rafael, Respondent's crew scheduling representative, because the rooms were too small. Respondent alleges that Complainant's request was yet another instance of insubordination and that Complainant essentially lied to the crew scheduling representative to get his way. After Ms. Rafael explained to Complainant that the size of the rooms was not a valid reason for switching hotels, he told her that the hotel was unsafe. By Complainant's own testimony, he told Ms. Rafael whatever he needed to say in order to get new hotel rooms. As a result of this incident, Complainant was given a verbal warning by Mr. Phinney, who explained that Complainant needed to communicate more clearly with the company when he wanted something to happen. Finally, Mr. Phinney noted that Complainant's threat to rent a van and drive the crew back to Fort Lauderdale if he did not get his paperwork for the Port-au-Prince flight was yet another example of Complainant's counterproductive, inappropriate behavior on the job. In Mr. Phinney's view, Complainant manipulated the truth in order to get his way. Ultimately, Mr. Phinney testified, Complainant's discharge was a result of poor performance and an inability to meet the performance standards of a captain.

The Court acknowledges that Complainant's tactics for getting things done were perhaps not the most effective way of accomplishing his aims, to say the least. On the other hand, it is clear from Complainant's testimony that he took the FAA regulations seriously and that he tried to look out for his fellow crew members. As for the failed check rides, which Complainant testified were not unusual, the Court notes that Respondent could not have been too concerned about these check rides when it decided to hire Complainant after he corrected his problems and passed his subsequent check rides. Ultimately, Complainant's termination in the middle of a meeting about the refused flight to Port-au-Prince was the direct result of his comment that he would not have done anything differently in terms of refusing that flight. Had Complainant not made the comment to Mr. Phinney, Mr. Phinney would not have discharged him. Although Mr. Phinney now cites other reasons for his displeasure with Complainant's actions as a captain, Respondent has failed to produce clear and convincing evidence that these actions by themselves would have resulted in Complainant's termination had he not engaged in protected activity on August 29, 2002. Given that the Court has found that Complainant's refusal to fly was a protected activity under the circumstances, the Court has no choice but to conclude that Complainant's termination was indeed the result of his engagement in protected activity.

Remedies

29 C.F.R. § 1979.109(b) provides:

> If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

Back Pay

Complainant seeks back pay for the time he was unemployed. Complainant testified that his rate of pay when working for Respondent was $75 per hour, with a sixty-hour guarantee. He earned about $4,500 per month as well as $200 to $300 in per diem benefits each time he flew. I find that Complainant would have earned $58,500 from the time of his discharge until he obtained new employment in October 2003. After his termination, Complainant received about nine months of unemployment compensation at about $275 per week for forty-four weeks. Complainant also worked for about three months as an electrician, earning about $3,200 per month. Accordingly, the amount of back pay owed by Respondent shall be offset by these amounts. Subtracting the compensation Complainant received during this period, I find the total back pay award should be $36,800.00.

Out of Pocket Expenses

In Creekmore v. ABB Power Sys. Energy Serv., Inc., 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary indicated that health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, including premiums for family medical coverage.

Although Complainant testified that he lost his health insurance coverage when he was terminated, he has not indicated any expenses that he incurred as a result. In fact, Complainant had been paying for the coverage while employed.

Compensatory Damages for Mental Anguish

In order to recover compensatory damages, a complainant needs to show that he or she experienced mental pain and suffering and that the unlawful discharge caused the pain and suffering. Crow v. Noble Roman's, Inc., 1995-CAA-8 (Sec'y Feb. 26, 1996) (citing Blackburn v. Martin, 982 F.2d 125, 131 (4th Cir. 1992) (ERA case)). In Crow, the complainant testified that he had worked for the respondent and a predecessor company for almost ten years and had no advance warning of his discharge for refusing to work on refrigeration equipment containing ozone-depleting compounds without a certification. Crow, slip op. at 3. There was evidence that the complainant could not afford health insurance after the discharge and received food stamps for a period. He testified that he had very little money and "it was pretty hard." Id. The Secretary found that this testimony was sufficient to establish entitlement to $10,000 in compensatory damages. Id.

Complainant in this case testified that he had to borrow about $8,000 after he was terminated by Respondent. Even though his wife has continued to work since his discharge, "it's hard to get by." Complainant no longer has health insurance because he cannot afford it. While the Court recognizes the difficulties inherent in unemployment, Complainant's situation is not as dire as the situation in Crow. I find that $5,000 is appropriate for compensatory damages.

ORDER

IT IS HEREBY ORDERED that Respondent Planet Airways:

1. Pay to Complainant back pay in the amount of $36,800.00.

2. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by Section 6221 of the Internal Revenue Code, 26 U.S.C. § 6221;

3. Pay to Complainant compensatory damages in the amount of $5000.00 for infliction of emotional distress; and

4. Pay to Complainant all costs and expenses, including attorney's fees, reasonably incurred in connection with this proceeding. Thirty days is hereby allowed to Complainant's counsel for submission of an application for attorney's fees. A service sheet showing that service has been made upon Respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections. It is requested that the petition for

services and costs clearly state (1) counsel's hourly rate and supporting argumentation or documentation thereof, and (2) a clear itemization of the complexity and type of services rendered.

SO ORDERED.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bbd

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§§§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).